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No. 87-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA BERKMAN, on behalf of herself and a class consisting of all similarly situated women,

Petitioner,

—v.—

THE CITY OF NEW YORK; EDWARD I. KOCH, individually and as Mayor of the City of New York; NEW YORK CITY FIRE DEPARTMENT; AUGUSTUS BEEKMAN, individually and as Fire Commissioner of the City of New York; NEW YORK CITY DEPARTMENT OF PERSONNEL; MICHAEL NADEL, individually and as Director of Personnel of the City of New York; THOMAS ROCHE, individually and as former Director of Personnel of the City of New York; CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,

Respondents,

—and—

UNIFORMED FIREFIGHTERS ASSOCIATION and FIREFIGHTER ELIGIBLES ASSOCIATION, LIST NO. 1162, INC.,

Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 13, 1987

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QUESTIONS PRESENTED

This petition raises three questions. The first implicates Fed. R. Civ. P. 52(a) and this Court's consistent holdings concerning the deference that appellate courts must accord to district courts' findings of fact, see, e.g., Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985); it also implicates the fundamental principle of Title VII, 42 U.S.C. §§ 2000e et seq., that a discriminatory employment-selection procedure may not be upheld on the basis of arbitrary, "obvious," and "self-evident" notions of job-relatedness, see, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430-33 (1971). The second and third questions concern the criteria for determining the validity, under Title VII, of a physical test that has the effect of

excluding a protected minority -- in this case, women -- from a career (firefighting) that traditionally has been a male preserve, notwithstanding the fact that women currently are on the job and are performing competently.

1. Where the Court of Appeals rejected the district court's sound findings of fact and upheld a discriminatory physical test on the basis of "obvious" and "self-evident" notions of job-relatedness, did the Court of Appeals depart from the accepted and usual course of judicial proceedings, from the mandate of Fed. R. Civ. P. 52(a), from the scope of appellate review prescribed in this Court's decisions, and from fundamental principles of Title VII, as expounded by this Court and by other federal Courts of Appeals?

2. Where the Court of Appeals acknowledged that the physical test at issue does not evaluate a measurable "prime requirement" for the job and consequently demands performance in a manner unrepresentative of the job's requirements, can that test be considered content-valid despite its total exclusion of a protected group from the job?

3. Where a rank-ordered physical test has the effect of excluding a protected group from the job, and where the employer has failed to prove a correlation between higher test scores and better job performance, can that test, as originally scored, be considered content-valid?

LIST OF PARTIES

The plaintiff below was Brenda Berkman, as representative of a class consisting of similarly situated women. The defendants named in the complaint were the City of New York; Edward I. Koch, individually and as Mayor of the City of New York; the New York City Fire Department; Augustus Beekman, individually and as Fire Commissioner of the City of New York; the New York City Department of Personnel; Michael Nadel, individually and as Director of Personnel of the City of New York; Thomas Roche, individually and as former Director of Personnel of the City of New York; and the Civil Service Commission of the City of New York.

The Uniformed Firefighters Association, Firefighter Eligibles Association, List No. 1162, Inc., and James

T. Ahrens intervened as defendants in the district court.

Brenda Berkman was the appellee and cross-appellant in the Court of Appeals, and the City of New York, et al., the Uniformed Firefighters Association, and Firefighter Eligibles Association, List No. 1162, Inc. were the appellants and cross-appellees.

The City of New York, et al., the Uniformed Firefighters Association, and Firefighter Eligibles Association, List No. 1162, Inc. are the respondents before this Court.

Petitioner Brenda Berkman is a natural person, not a corporation, and Rule 28.1 thus does not apply.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	iv
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	2
JURISDICTION	3
STATUTES AND REGULATIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	15
I. The Court of Appeals' rejection of the district court's sound findings of fact and its upholding of a discriminatory physical test on the basis of "obvious" and "self-evident" notions of job requirements departed from the accepted and usual course of judicial proceedings, from the mandate of Fed. R. Civ. P. 52(a), from the scope of appellate review prescribed by this Court in Anderson v. City of Bessemer City, and from fundamental principles of Title VII, as expounded by this Court and by other federal Courts of Appeals	18

PAGE

II. The Court of Appeals' approval of a physical test that does not measure "the prime [physical] requirement" for the job of firefighter and that demands performance in a manner unrepresentative of the job's requirements directly conflicts with sound principles of employment-test validation established in the applicable decisions of other federal Courts of Appeals and in the Uniform Guidelines on Employee Selection Procedures 36

III. The Court of Appeals' approval of a rank-ordered physical test that is not supported by evidence linking faster test times with better job performance and that totally excludes women from the job directly conflicts with principles of employment-test validation established in the applicable decisions of other federal Courts of Appeals and in the Uniform Guidelines on Employee Selection Procedures 45

PAGE

CONCLUSION 52

APPENDIX ..... *

---

* See separate volume.

TABLE OF AUTHORITIES

Cases:	PAGE
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	30, 32, 39
Anderson v. City of Bessemer City, 470 U.S. 564 (1985)	passim
Berkman v. City of New York, 812 F.2d 52 (2d Cir. 1987) ("Berkman IV")	passim
Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) ("Berkman II")	passim
Berkman v. City of New York, No. 79 Civ. 1813 (E.D.N.Y. June 13, 1986)	9
Berkman v. City of New York, 626 F. Supp. 591 (E.D.N.Y. 1985) ("Berkman III"), aff'd in part and rev'd in part, 812 F.2d 52 (2d Cir. 1987)	passim
Berkman v. City of New York, 580 F. Supp. 226 (E.D.N.Y. 1983)	9
Berkman v. City of New York, 536 F. Supp. 177 (E.D.N.Y. 1982) ("Berkman I"), aff'd, 705 F.2d 584 (2d Cir. 1983)	passim
Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980)	31, 32

Cases: PAGE

Brunet v. City of Columbus, 642 F. Supp. 1214 (S.D. Ohio 1986), appeal docketed, Nos. 86-3357, -3603 (6th Cir. June 12, 1986) 28, 38, 46

Burney v. City of Pawtucket, 559 F. Supp. 1089 (D.R.I. 1983) 32, 51

Evans v. City of Evanston, 621 F. Supp. 710 (N.D. Ill. 1985) 28

Firefighters Institute for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981) 46

Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), cert. denied, 434 U.S. 819 (1977) . 38, 40, 44

Gillespie v. State of Wisconsin, 771 F.2d 1035 (7th Cir. 1985), cert. denied, 106 S. Ct. 854 (1986) 38, 40, 46

Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..... i, 29, 32

Cases: PAGE

Harless v. Duck, 619 F.2d 611 (6th Cir.), cert. denied, 449 U.S. 872 (1980) 31, 32

Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir.), vacated on other grounds, 423 U.S. 809, adhered to on remand, 526 F.2d 722 (8th Cir. 1975) 31, 32, 51

Thomas v. City of Evanston, 610 F. Supp. 422 (N.D. Ill. 1985) 31, 46, 51

United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978) 38

Vanguard Justice Society, Inc. v. Hughes, 592 F. Supp. 245 (D. Md. 1984) 38, 46

Statutes, Regulations, and Rules:

28 U.S.C. § 1254(1) 3

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. ..... passim

Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 ("Uniform Guidelines") ..... passim

Fed. R. Civ. P. 52(a) ..... passim

Other Authorities: PAGE

American Psychological Association, Inc., Standards for Educational and Psychological Tests (1974) ("APA Standards") 38, 40

Colker, "Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination," 19 U.C.D. L. Rev. 761 (1986) 34, 45

EEOC, "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," 44 Fed. Reg. 11,996 (1979) 47

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BRENDA BERKMAN, etc.,

Petitioner,

-v.-

THE CITY OF NEW YORK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brenda Berkman petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on February 17, 1987, affirming in part and reversing in part a district court order, entered after trial, directing the rescoring of New York City's entry-level test for the

job of firefighter. The Court of Appeals' decision upheld the City's test as originally proposed, notwithstanding the deficiencies that the district court found in the test, and will completely end the hiring of female firefighters in New York City.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Berkman v. City of New York, 812 F.2d 52 (2d Cir. 1987) ("Berkman IV"). The opinion also is reported at 43 Fair Empl. Prac. Cas. (BNA) 318 and 42 Empl. Prac. Dec. (CCH) ¶ 36,902, and is reproduced in the Appendix at A1-A50.

The ruling by the United States District Court for the Eastern District of New York (Sifton, J.) is reported as Berkman v. City of New York, 626 F. Supp.

591, 43 Fair Empl. Prac. Cas. (BNA) 305, 38 Empl. Prac. Dec. (CCH) ¶ 35,687 (E.D.N.Y. 1985) ("Berkman III"), and is reproduced in the Appendix at A51-A101. The district court's unreported supplemental order also is reproduced in the Appendix at A102-A108.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1987. On April 14, 1987, the Court of Appeals denied petitioner's petition for rehearing. A364-A365. The mandate issued on February 17, 1987. A362-A363. This Court has jurisdiction to review the judgment in this case pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This petition involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. The petition also involves the Uniform Guidelines on Employee Selection Procedures (the "Uniform Guidelines"), 29 C.F.R. § 1607. The pertinent portions of Title VII and the Uniform Guidelines are reproduced in the Appendix at A394-A408.

STATEMENT OF THE CASE

This eight-year-old case concerns the validity of a physical test that the City of New York (the "City") has used to screen candidates for the job of entry-level firefighter. The litigation began in 1979, when petitioner Brenda Berkman filed this Title VII class action alleging that the City's then-current entry-level physical test, Exami-

nation 3040 ("Exam 3040") -- the first firefighter test that the City ever had allowed women to take -- discriminated against women in violation of Title VII.

On March 4, 1982, after hearing 28 days of testimony, including extensive expert testimony by industrial psychologists and exercise physiologists, the district court ruled that Exam 3040 violated Title VII in that the physical test had overwhelming adverse impact on female applicants (all of whom failed the test) and had not been shown to be job-related. This lack of validity resulted, to a large extent, from the test's overwhelming emphasis on maximal speed and strength and from its failure to measure stamina, or aerobic capacity, the "prime requirement" for effective performance on the job. Berkman v. City of New York, 536 F. Supp. 177, 204, 207, 212, 215

(E.D.N.Y. 1982) ("Berkman I"). A169, A292, A308-A310, A329-A334, A346-A347.

On March 25, 1982, the district court entered an order that, inter alia, directed the parties to attempt to agree on a special qualifying test to determine whether class members were qualified to be hired as firefighters; the court also instructed the City to develop a new, nondiscriminatory physical test in consultation with petitioner. The City proposed, and petitioner accepted, a pass/fail qualifying test (consisting of simulations of various firefighting activities) that was administered to class members in September 1982, resulting in the City's hiring the first (and only) female firefighters ever employed by the New York City Fire Department. Approximately 40 female firefighters currently are on the job, most of them since

September 25, 1982, and there is no documented instance of a female firefighter's proving physically unable to perform her duties.

The Uniformed Firefighters Association ("UFA"), which had intervened in the case, appealed the district court's order to the Court of Appeals for the Second Circuit. The Court of Appeals affirmed the district court's decision in full and expressly observed that "the evidence suggested, and the [district] court found, that the most important physical attribute for a firefighter is not strength but stamina." Berkman v. City of New York, 705 F.2d 584, 598 (2d Cir. 1983) ("Berkman II"). A109, A166.

The City developed a new entry-level physical test. This new test, Examination 1162 ("Exam 1162"), which was composed of a series of events relatively

similar to those of the qualifying test, consisted of simulations of activities that firefighters perform on the job. However, the City decided that, unlike the pass/fail qualifying test, Exam 1162 would be used for rank-ordered hiring based solely on speed to completion. Recognizing that such scoring was inconsistent with the district court's prior findings of fact, the City moved in the district court on October 18, 1982 (a) for modification of findings of fact and conclusions of law in Berkman I relating to the need for paced, aerobic performance of firefighting tasks, as opposed to performance at maximal speed and strength, and (b) for approval of Exam 1162.

The district court heard 22 days of testimony between January 1983 and July 1985 concerning the validity of

Exam 1162.[1] During this period, the City administered the test to more than 22,000 applicants. Only 46.67 percent of the female candidates (as compared to 95.42

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[1] During this period, the City terminated the employment of petitioner and another class member, allegedly because of their inability to perform as firefighters. After a trial, which showed that the City discriminatorily had failed to train the women, rather than that the women were physically unable to perform, the district court ordered the City to reinstate the two women. The court found that they had been terminated "in retaliation for the prominent role both assumed in pursuing their rights under the Court's orders and because of intentional discrimination against each on account of their sex." Berkman v. City of New York, 580 F. Supp. 226, 230 (E.D.N.Y. 1983). In June 1986, the court, adopting a federal magistrate's report and recommendation rendered after an extensive hearing, enjoined yet another retaliatory action against a third prominent class member and asked the United States Attorney's Office to consider the appropriateness of filing civil or criminal contempt or civil-rights charges against the City. Berkman v. City of New York, No. 79 Civ. 1813 (E.D.N.Y. June 13, 1986). A366-A393.

percent of the male candidates) passed the physical test, and not a single woman scored high enough to have any chance of being hired under the City's rank-ordered scoring scheme.

On October 8, 1985, the district court issued a memorandum and order invalidating Exam 1162 as originally scored. Berkman III. A51-A101. The court recognized that the components of the rank-ordered Exam 1162 were based on the components of the pass/fail 1982 qualifying test, upon which the parties had agreed, and found that "so much of Exam 1162 as derives from the qualifying test is . . . job-related and valid." A70; 626 F. Supp. at 595. The court also found that Exam 1162's two principal additions to the pass/fail qualifying test (the wall-vault and hose-pull se-

quences) were job-related events. A74-A78; 626 F. Supp. at 596.

But the district court's findings concerning the job-relatedness of Exam 1162's components did not amount to a finding that the test called for performance of those tasks as they would be performed by firefighters on the job; rather, the court found that the test demanded performance in a manner unrepresentative of that of the job. The court found that Exam 1162, scored strictly as a rank-ordered speed test (unlike the pass/fail qualifying test), placed "too great an emphasis on the anaerobic capacities of candidates with too little regard for those aspects of firefighting that call upon prudent, paced performance." A90-A91; 626 F. Supp. at 599. Citing its own 1982 findings and the City's purported new evidence, the court

ruled that the City had "failed lamentably to establish a basis for the emphasis placed on maximal strength and speed in Exam 1162," A82; 626 F. Supp. at 598, which failure could "only confirm this Court's earlier conclusion that a test that places undue emphasis on anaerobic energy and speed invidiously discriminates against women," A87; 626 F. Supp. at 599.

Perhaps unduly influenced by its concern for the expectations of applicants who successfully had completed Exam 1162, the district court did not order administration of a new, nondiscriminatory test; instead, it directed the City to rescore Exam 1162 in a manner that lessened the speed-related distinctions among candidates. In its final order, dated February 14, 1986, the court ordered further rescoring in an attempt

to restrict to its intended value the physical test's contribution to candidates' combined scores on the written and physical portions of Exam 1162. (These combined scores were supposed to represent an equally weighted average of candidates' scores on the two tests; however, because of the written test's utter failure to distinguish among candidates based on cognitive ability, Exam 1162 actually selected applicants solely on the basis of their physical-test performance.) A102-A108.

The City, the UFA, and another intervenor appealed from the district court's rulings, and petitioner cross-appealed. Petitioner contended that, in light of the district court's finding that Exam 1162, as originally scored, "place[d] undue emphasis on certain physical capacities not required for the job"

and failed to measure endurance and aerobic capacity, A100, A87-A91; 626 F. Supp. at 601, 599, the court should have ordered the City to develop and administer a new test that gave due "regard [to] those aspects of firefighting that call upon prudent, paced performance," A90-A91; 626 F. Supp. at 599. The City and the intervenors criticized the district court's rescoring plan, pointing out (correctly) that the revision did not decrease the test's adverse impact on women.

The Court of Appeals rejected petitioner's cross-appeal and reversed those portions of the district court's rulings that ordered rescoring. Berkman IV, A1-A50. The Court of Appeals mistakenly concluded that the district court had "upheld the validity of the test," A30; 812 F.2d at 59; based on this mis-

perception, the Court of Appeals reasoned that the district court should not have ordered rescoring of the test in a manner that "operate[d] to the detriment of both test validity and women applicants," A36; 812 F.2d at 60. The Court of Appeals therefore upheld Exam 1162 as originally scored, basing its ruling on the "[o]bvious[]" and "self-evident" proposition that firefighters will "frequently be obliged to use [anaerobic] strength and speed in a short amount of time." A32; 812 F.2d at 59.

REASONS FOR GRANTING THE WRIT

Petitioner seeks review of the opinion and judgment of the Court of Appeals in three respects:

First, the Court of Appeals, by ignoring or rejecting the district court's sound findings of fact and by

upholding a discriminatory physical test on the basis of "obvious" and "self-evident" notions of job requirements, departed from the accepted and usual course of judicial proceedings, from the mandate of Fed. R. Civ. P. 52(a), from the scope of appellate review prescribed by this Court in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), and from fundamental principles of Title VII, as expounded by this Court and by other federal Courts of Appeals.

Second, the Court of Appeals, by approving a physical test that does not measure "the prime [physical] requirement" for the job of firefighter and that demands performance in a manner unrepresentative of the job's requirements, has rendered a decision that directly conflicts with principles of employment-test validation established in

the applicable decisions of other federal Courts of Appeals and in the Uniform Guidelines.

Third, the Court of Appeals, by approving a physical test rank-ordered on the basis of small increments of speed despite the absence of evidence closely linking faster test performance with better job performance and despite the rank-ordered scoring system's total exclusion of women from the job, has rendered a decision that directly conflicts with principles of employment-test validation established in the applicable decisions of other federal Courts of Appeals and in the Uniform Guidelines.

Petitioner does not seek review of any particular proposed or rejected scheme to rescore Exam 1162. Questions as to specific forms of relief can be

addressed by the district court on remand.

I.

The Court of Appeals' rejection of the district court's sound findings of fact and its upholding of a discriminatory physical test on the basis of "obvious" and "self-evident" notions of job requirements departed from the accepted and usual course of judicial proceedings, from the mandate of Fed. R. Civ. P. 52(a), from the scope of appellate review prescribed by this Court in Anderson v. City of Bessemer City, and from fundamental principles of Title VII, as expounded by this Court and by other federal Courts of Appeals.

At the conclusion of the 1981 trial on the validity of Exam 3040, the district court found that "stamina rather than brute strength is the prime requirement for the job of firefighting," A292; Berkman I, 536 F. Supp. at 204; accord A308-A310, A329-A334, A346-A347; 536 F. Supp. at 207, 212, 215, and invalidated Exam 3040 for (inter alia) failure to

measure aerobic capacity. The Court of Appeals affirmed the district court's order and expressly relied on the district court's finding that "the most important physical attribute for a firefighter is not strength but stamina." A166; Berkman II, 705 F.2d at 598.

In ruling on the validity of Exam 1162, the district court reviewed (and quoted extensively from) its earlier findings of fact, considered newly introduced evidence, and concluded, based on a composite trial record reflecting 50 days of testimony: "Despite these [1982] findings and this Court's stated readiness to hear additional proof on the issue, defendants failed lamentably to establish a basis for the emphasis placed on maximal strength and speed in Exam 1162." A82; Berkman III, 626 F. Supp. at 598. The district court thus found that

Exam 1162, scored as a speed test, was representative neither of the content of the job of firefighting nor of the manner in which firefighters perform their job. The court also attempted to reduce the test's emphasis on speed by altering the scoring system. This effort, however, was not based, as the Court of Appeals erroneously believed, primarily on a theory of less onerous alternatives but on the mistaken idea that the test's invalidity could be cured through a widening of the scoring bands.

This time, the Court of Appeals departed radically from its appellate authority and utterly disregarded the district court's finding that Exam 1162, scored as a narrowly rank-ordered test, "places undue emphasis on certain physical capacities not required for the job," A100; 626 F. Supp. at 601. The Court of

Appeals justified this disposition by substituting its own contradictory findings, based on purportedly "[o]bvious[]" and "self-evident" assertions, A32; 812 F.2d at 59, for those of the district court.

The Court of Appeals' cavalier disregard of findings of fact based on an extensive trial record replete with expert testimony violates the mandate of Fed. R. Civ. P. 52(a) and this Court's ruling in Anderson v. City of Bessemer City, 470 U.S. 564, 573-75 (1985), both of which compel appellate courts to defer to findings of fact that are not "clearly erroneous." Perhaps even more importantly, the Court of Appeals' decision eviscerates Title VII jurisprudence, whose aim has been to eliminate employment discrimination resulting from stereotypes and other "intuitive" percep-

tions about job requirements that are commonly accepted but that prove, upon careful examination, to have no basis in fact.

Rule 52(a) provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Construing the "clearly erroneous" standard, this Court recently held:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

Anderson, supra, 470 U.S. at 573-74.

The Court of Appeals' decision flouts this fundamental principle of appellate review, as the following juxtaposition of trial- and appellate-court findings reveals.

FINDINGS OF FACT MADE BY THE DISTRICT COURT AND THE COURT OF APPEALS

District Court's Findings	Court of Appeals' "Findings"
"The principal ground for contention between the parties relates to their differing approaches to an issue which first arose in connection with Exam 3040, namely, the issue as to the role of speed versus pacing in the performance of firefighting or, to put it another way, the need for anaerobic as opposed to aerobic energy in performing important firefighting tasks. On this issue, this Court had previously rejected the City's position that firefighting is an all-out sprint event performed at maximal heart rate, calling on reserves of [an]aerobic energy in connection with Exam 3040, and plaintiff's arguments that defendants failed to develop an adequate job analysis with respect to this issue carry considerable force.	"Obviously, firefighters frequently face situations where their anaerobic abilities determine whether or not they will save the lives of fire victims. The firefighter arriving on the scene of a fire will frequently be obliged to use strength and speed in a short amount of time. Abundant evidence in the record supports this point, which in any event would be self-evident. It may well be that the effectiveness of a person with minimal stamina will decline if called upon to perform firefighting tasks over a considerable period of time. Perhaps a person with greater stamina would perform the tasks better after protracted activity than the firefighter who might excel in the first few minutes of activity. But the Fire Department is entitled to select those who are endowed with the physical abilities to act effectively in the

District Court's Findings	Court of Appeals' "Findings"
In its opinion invalidating Exam 3040, this Court found:	
'Few jobs making large physical demands, least of all firefighting, are properly performed at maximum speed or at the limits of one's strength or endurance. As [plaintiff's] witnesses testified, what must be identified are not those who are strongest or fastest but, instead, those who, with the benefit of training in pacing or because of their natural capacities of endurance, can perform the punishing tasks of firefighting as they are actually required to be performed. According to these witnesses, firefighting takes its toll, not as a result of failures of maximum strength or speed, even at critical moments, but rather through the physical demands extending over long periods of time which necessitate paced performance at less-than-maximum lev-	first moments of arrival at a fire scene, where immediate speed and strength literally concern matters of life and death. If a person with limited stamina tires during the course of firefighting duties, that person can be replaced with a fresh firefighter. However, if the first firefighters on the scene are deficient in the speed and strength necessary to handle their tasks, those in need of immediate rescue will not be comforted by the fact that those first on the scene might be able to sustain their modest energy levels for a prolonged period of time." * * * "As we pointed out above, speed in the performance of a firefighter's task is highly relevant to successful job performance; collapsing the seven bands of test completion times into three bands serves

District Court's Findings	Court of Appeals' "Findings"
els. This explanation makes sense of a number of otherwise puzzling features of firefighting, namely, the ability of firemen to continue to do their work competently over an entire working career and the results of physical testing of incumbent male firemen which show that on a variety of measures of maximum physical capacity firemen rate no better than the average American male. It also makes sense in terms of the recognized dangers of firefighting and their unpredictability which, as numerous witnesses testified, make hazardous in the extreme performance at top speed or at the limits of strength or capacity. Not only does maximal performance compromise the firefighter's ability to pace performance over the long periods of time during which physical demands are being made on the body, in addition, the very unpredictability of fire	only to oblige the defendants to select some applicants ahead of others who have demonstrated the capacity to handle firefighter tasks more swiftly." * * * "As discussed above, the defendants have an entirely legitimate interest -- a job-related interest -- in according priority in hiring to those with the demonstrated ability to perform firefighting tasks speedily." A32-A34, A36, A42; Berkman IV, 812 F.2d at 59-60, 61.

District Court's Findings	Court of Appeals' "Findings"
and the instability of burning structures call upon qualities of foresight, endurance, and pacing not examined by tests of maximum physical strength.' Berkman v. City of New York, supra, 536 F. Supp. at 212 (footnotes omitted). Despite these findings and this Court's stated readiness to hear additional proof on the issue, defendants failed lamentably to establish a basis for the emphasis placed on maximal strength and speed in Exam 1162." A79-A82; Berkman III, 626 F. Supp. at 597-98 (footnotes omitted).	

While purporting to declare the district court's findings not clearly erroneous, A30-A31, A35; Berkman IV, 812 F.2d at 59, 60, the Court of Appeals rejected those well supported findings concerning the prime importance of aerobic ability[2] and substituted its own ad hoc conclusions about the need for break-neck speed. The appellate court based its pronouncements on what it deemed "[o]bvious[]" and "self-evident" propositions even though the district court had twice

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[2] Another recent case, Brunet v. City of Columbus, 642 F. Supp. 1214, 1222, 1245-50 (S.D. Ohio 1986), appeal docketed, Nos. 86-3357, -3603 (6th Cir. June 12, 1986), reached conclusions virtually identical to those of the district court concerning the importance of stamina, as opposed to all-out speed, in performing firefighting tasks. Cf. Evans v. City of Evanston, 621 F. Supp. 710, 712 (N.D. Ill. 1985) (upholding cognizability of claim that firefighter test improperly failed to measure endurance and pacing).

found otherwise and even though the City had never propounded, and could not credibly have argued, the Court of Appeals' own theory of firefighting, which holds that exhausted firefighters can readily be replaced with fresh troops.[3]

Not only does the Court of Appeals' decision violate the dictates of Anderson and Rule 52(a); it also vitiates the very purpose of Title VII. As this Court held in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), Title VII requires "the removal of artificial, arbi-

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[3] Nowhere in the record is there any testimony from any witness stating that, "[i]f a person with limited stamina tires during the course of firefighting duties, that person can be replaced with a fresh firefighter," A33; 812 F.2d at 59. Under conditions of heavy smoke and limited visibility, and with the possibility of structural collapse an ever-present danger, the notion that exhausted firefighters can readily be replaced appears naive, rather than obvious.

trary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." The thrust of Title VII law thus has been to inject a scientific element into employment-selection procedures and to compel employers to demonstrate the "business necessity" or "job relatedness" of practices that have an adverse impact on minorities. Id.; accord Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-26, 431 (1975).

For these reasons, this Court and others have required employers to validate discriminatory tests "by professionally acceptable methods," Albemarle Paper Co., supra, 422 U.S. at 431, and have warned that employers may not justify such selection procedures by relying on "obvious," intuitive, or other unveri-

fied notions of job-relatedness, see, e.g., Harless v. Duck, 619 F.2d 611, 616 (6th Cir.), cert. denied, 449 U.S. 872 (1980) (invalidating test developed through "intuitive" process); Blake v. City of Los Angeles, 595 F.2d 1367, 1378 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980) (employer cannot meet Albemarle burden "by the assertion of an 'obvious,' but unmeasured, relationship between selection standards and qualities thought necessary for job performance"); Rogers v. International Paper Co., 510 F.2d 1340, 1346 (8th Cir.), vacated on other grounds, 423 U.S. 809, adhered to on remand, 526 F.2d 722 (8th Cir. 1975) (job analysis needed to avoid "personal biases or discriminatory stereotype classifications"); Thomas v. City of Evanston, 610 F. Supp. 422, 432 (N.D. Ill. 1985) ("Too often tests which on the sur-

face appear objective and scientific turn out to be based on ingrained stereotypes and speculative assumptions about what is 'necessary' to the job."); Burney v. City of Pawtucket, 559 F. Supp. 1089, 1101 (D.R.I. 1983) (rejecting "pragmatic building blocks such as 'human experience' and 'experience of police officers on the job'"; cannot substitute "instinct for hard proof").

The Court of Appeals' ruling directly conflicts with both the letter and the spirit of Griggs, Albemarle, Harless, Blake, Rogers, and a host of other decisions. Since the very outset of this litigation, petitioner has been forced to deal with stereotypes and other "intuitive" perceptions about the job requirements of firefighting. These stereotypes -- which depict firefighters dashing into burning structures like cav-

alry troops charging into battle, notwithstanding heavy smoke conditions, the danger of flashovers and structural collapse, obstacles, etc., and using maximal speed and strength in situations where such performance would be impractical, imprudent, and often extremely dangerous -- have been closely examined for these past eight years on the basis of admissible evidence, including extensive expert testimony. The district court's findings, made not once but twice, and affirmed in 1983 by the Court of Appeals, reflect the hard evidence found in the record concerning the role of speed versus pacing in critical firefighting situations. Those findings should have been accorded far more deference than they in fact received, and the Court of Appeals, by substituting its own fanciful notions of firefighting for the realities sup-

ported by the evidence, deprived petitioner of all opportunity to demonstrate the naivete of those notions in terms of how fires actually are fought in an urban setting.

By making de novo findings wholly inconsistent with those of the district court on this central point, the Court of Appeals has created a dangerous precedent that will make it extremely difficult for women seeking jobs in firefighting -- or in any other traditionally male career commonly perceived as making stringent physical demands -- to overcome stereotypes concerning the importance of raw speed and strength. See generally Colker, "Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination," 19 U.C.D. L. Rev. 761 (1986). No plaintiff will dare, as did

petitioner, to hire industrial psychologists and exercise physiologists and to subsidize their visits to firehouses and job-task demonstrations if, after all that expense and careful analysis of the job, findings of fact based on such expert testimony can be so lightly swept aside on the basis of an appellate court's spontaneous, de novo findings. Nor will attorneys agree to litigate such cases.

This Court should grant a writ of certiorari to review the decision below. Only such action can preserve the formerly undisputed principle that intuitive perceptions of how a job is performed are simply too unreliable to support a determination concerning the job-relatedness of a test that completely excludes a protected group from the hiring process.

II.

The Court of Appeals' approval of a physical test that does not measure "the prime [physical] requirement" for the job of firefighter and that demands performance in a manner unrepresentative of the job's requirements directly conflicts with sound principles of employment-test validation established in the applicable decisions of other federal Courts of Appeals and in the Uniform Guidelines on Employee Selection Procedures.

In attempting to reconcile the district court's seemingly conflicting conclusions that (a) the physical test is content-valid in the sense that it tests for "important physical capacities necessary to be a successful firefighter" and (b) the scoring system "places undue emphasis on certain physical capacities not required for the job," A100; Berkman III, 626 F. Supp. at 601, the Court of Appeals observed that, "though the District Court expressed some criticism of the physical test for inadequate assess-

ment of anaerobic [sic; aerobic] energy capacity, the Court nonetheless upheld the validity of the test," A30; Berkman IV, 812 F.2d at 59. By this stroke, the Court of Appeals ignored the basic principle, established by numerous federal courts and by the Uniform Guidelines, that a test cannot be content-valid unless its content and manner of performance are representative of the content of the job and the manner in which it is performed.

The concept of representativeness has two components. The first part requires the content of an employment test to be representative of the content of the job for which applicants' qualifications are being evaluated. Thus, a test is content-valid only if it measures all important abilities required for the job (or at least those abilities that are

measurable); a test that fails to measure important (and measurable) job-related capacities is not content-valid. See, e.g., Gillespie v. State of Wisconsin, 771 F.2d 1035, 1044 (7th Cir. 1985), cert. denied, 106 S. Ct. 854 (1986); United States v. City of Chicago, 573 F.2d 416, 425-26 (7th Cir. 1978); Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 511-12 (8th Cir.), cert. denied, 434 U.S. 819 (1977); Brunet v. City of Columbus, supra, 642 F. Supp. at 1248-50; Vanguard Justice Society, Inc. v. Hughes, 592 F. Supp. 245, 258-60, 265-66 (D. Md. 1984); Uniform Guidelines, § 1607.14(C)(4), A403-A406; American Psychological Association, Inc., Standards for Educational

and Psychological Tests ("APA Standards") 28-29 (1974).[4]

The Court of Appeals, by contrast, has upheld a test that fails to measure what the district court twice found to be "the prime requirement for the job of firefighting": stamina, or aerobic capacity, see A79-A90; Berkman III, 626 F. Supp. at 597-99; accord A292, A308-A310, A329-A334, A346-A347; Berkman I, 536 F. Supp. at 204, 207, 212, 215. Moreover, the district court found this prime requirement to be eminently measur-

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[4] This Court has held that the Uniform Guidelines, while not administrative regulations, "are 'entitled to great deference.'" Albemarle Paper Co., supra, 422 U.S. at 431 (quoting Griggs, supra, 401 U.S. at 433-34). The Uniform Guidelines "draw upon and make reference to professional standards of test validation established by the American Psychological Association." Albemarle, supra, 422 U.S. at 431 (footnote omitted).

able, A88-A90; Berkman III, 626 F. Supp. at 599, and neither the City nor the Court of Appeals has criticized that finding. The Second Circuit's ruling thus conflicts directly with the holdings of other Courts of Appeals as well as with the dictates of the Uniform Guidelines and APA Standards. See, e.g., Gillespie v. State of Wisconsin, supra, 771 F.2d at 1044 (selection procedure must not "fail to test a significant skill required by the position"); Firefighters Institute for Racial Equality v. City of St. Louis, supra, 549 F.2d at 511-12 (invalidating examination that failed to test "an important and distinguishing attribute" needed for the job).

This violation of the representativeness requirement is especially critical, for Exam 1162's very failure to measure the job's prime requirement en-

hances the test's adverse impact on women. The extensive trial record contains unrefuted evidence -- drawn in part from studies conducted by the City's own exercise-physiology expert -- that the disparity between male and female performances on physical tests demanding short-term, maximal speed and strength (such as Exam 1162) decreases as the performance measure becomes more long-term or aerobic; women compete more evenly with men on events that require greater endurance. Thus, were Exam 1162 more representative of the job, it would not have such an exclusionary effect on the hiring of women.

The second aspect of the representativeness requirement mandates that the "manner and setting" of the test closely approximate the manner of performance of the job. Uniform Guidelines,

§ 1607.14(C)(4), A403-A406. The Court of Appeals' disregard for this aspect of content validity lies at the heart of the court's failure to grasp the distinction that the district court drew between the validity of Exam 1162's components (i.e., the series of physical tasks composing the test) and the invalidity of the test's manner of performance and scoring system.

Exam 1162 and its scoring system violate the manner-of-performance requirement because they place a premium on short-term, all-out exertion, without any regard for endurance. The test therefore compels candidates to perform anaerobically even though firefighters on the job perform those same tasks aerobi-

cally.[5] Exam 1162, as scored, thus is not content-valid (despite the job-relatedness of the activities tested) because it does not properly measure applicants' ability to perform firefighting tasks as those tasks are performed on the job.

The Court of Appeals' failure to acknowledge or appreciate the two aspects of representativeness is best illustrated by the court's erroneous conclusion that "[i]t does not follow" from the determination that stamina is an important attribute for successful job

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[5] An applicant must complete the physical test in 4-1/2 minutes or less (including a 100-second walk) if he or she is to have any chance of being hired. However, responses to the City's own job-analysis questionnaire show that firefighters on the job would take an average of 61 minutes 35 seconds to perform the sequence of tasks in Exam 1162.

performance "that a physical test of the ability to perform simulated job tasks of firefighters, without a specific measurement of stamina, lacks validity . . . ." A32; Berkman IV, 812 F.2d at 59. The representativeness requirement, however, means precisely that: a test user may not disregard the prime requirement of the job, at least when (as here) that ability is measurable. Firefighters Institute, supra, 549 F.2d at 511-12.

III.

The Court of Appeals' approval of a rank-ordered physical test that is not supported by evidence linking faster test times with better job performance and that totally excludes women from the job directly conflicts with principles of employment-test validation established in the applicable decisions of other federal Courts of Appeals and in the Uniform Guidelines on Employee Selection Procedures.

Until the Court of Appeals rendered its decision in Berkman IV, federal courts had agreed that an employer could not use a test for rank-ordered selection when rank-ordering resulted in adverse impact on a protected group and when the record contained insufficient evidence linking higher test scores with better job performance.[6] The

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[6] Narrowly rank-ordered physical tests have become the latest device to exclude women from formerly all-male jobs. See Colker, supra, at 776-79, 785-801. Many employers -- such as New York City -- originally prohibited

(Footnote continued)

lack of such evidence did not mean that the test could not be used at all; it meant only that the employer could not use the results for strict rank-ordered hiring. See, e.g., Gillespie v. State of Wisconsin, supra, 771 F.2d at 1045; Firefighters Institute for Racial Equality v. City of St. Louis, 616 F.2d 350, 359 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981); Brunet v. City of Columbus, supra, 642 F. Supp. at 1221-22, 1247-50; Thomas v. City of Evanston, supra, 610 F. Supp. at 431-32; Vanguard Justice Society, Inc. v. Hughes, supra, 592 F.

(Footnote 6 continued from previous page) women from applying for firefighter positions and other traditionally male jobs; with the advent of Title VII and its applicability to municipalities in 1972, employers adopted rank-ordered selection procedures, based on such traditionally male standards as maximal speed and strength, to perpetuate the exclusion of women from the job.

Supp. at 267-68. The Uniform Guidelines, § 1607.14(C)(9), propound the same principles, A408, as do the "questions and answers" that the EEOC promulgated to explain the Uniform Guidelines, see EEOC, "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," 44 Fed. Reg. 11,996, 12,005 (1979).

The district court, following these well established precepts, found that narrowly rank-ordered scoring[7] of Exam 1162 was not permissible because the

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[7] The physical test was scored in seven "bands" (100, 95, 90, . . . 70), based on speed to completion. Candidates who finished the test in less than four minutes scored 100; "completion in each of the six 30-second intervals between four and seven minutes was scored downward from 95 to 70 in five-point steps, and completion in more than seven minutes was considered failing." A7-A8; Berkman IV, 812 F.2d at 55.

City had failed to show that the sole basis for that rank-ordering -- all-out speed -- was a sufficiently job-related distinction among candidates. A82-A92; Berkman III, 626 F. Supp. at 598-600; accord A329-A334; Berkman I, 536 F. Supp. at 212. The Court of Appeals essentially disregarded those findings and decided, largely on the basis of its own intuitions, that "speed in the performance of a firefighter's task is highly relevant to successful job performance . . . ." A36; Berkman IV, 812 F.2d at 60. The Court of Appeals' upholding of a narrowly rank-ordered test in the face of the district court's two sets of findings concerning the undue emphasis placed on short-term speed violates established principles of content validity as articulated by other federal courts and by the Uniform Guidelines.

Nothing better illustrates this point than does the performance of incumbent firefighters on Exam 1162. In December 1982, 93 incumbents ran through the test as part of the City's "norming" process. Only three of these 93 incumbents, or three percent, scored high enough to be within hiring range based on the Exam 1162 eligibility list.[8] As part of its 1985 criterion study, the City administered Exam 1162 to 133 incumbents. Only 38 incumbents, o. 29 percent, achieved scores within hiring range.

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[8] The City, as of February 1987, projects that it will offer jobs to only the top 4,000 of the 21,200 candidates on the eligibility list. Those top 4,000 candidates all have composite scores of 96 or above (exclusive of veteran's credits). To achieve such a score, a candidate must have scored at least a 95 on the physical test (and thus must have completed that test in 4-1/2 minutes or less).

Thus, by the City's own standards, a very substantial majority of New York City's firefighters are unqualified for the job. Throughout these proceedings, however, the City consistently has asserted its complete satisfaction with the performance of its incumbent firefighters. One therefore can conclude only that the City's entry-level physical test imposes artifical hiring barriers designed to return the Fire Department to the all-male fraternity that it was before this case commenced. Sanctioning such artificial barriers violates the Uniform Guidelines' principle that employment tests should be scored on a scale that is "reasonable and consistent with normal expectations of acceptable proficiency within

the work force." Uniform Guidelines, § 1607.5(H), A399.[9]

Faced with data similar to those generated by Exam 1162, other courts have not hesitated to invalidate scoring systems that so poorly evaluated capable incumbents. See, e.g., Rogers v. International Paper Co., supra, 510 F.2d at 1351 (40 percent of incumbents would not have been hired); Thomas v. City of Evanston, supra, 610 F. Supp. at 431 (16 percent of incumbents would have failed); Burney v. City of Pawtucket, supra, 559 F. Supp. at 1103. The Court of Appeals' decision directly conflicts with these rulings, and a writ of certiorari should

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[9] Because no candidate who scored below 95 on the physical test will have any chance of being hired, see supra n.8, it is this score, rather than the technical cutoff of 70, that constitutes the only significant pass/fail mark.

issue to bring that decision to this Court for review.

CONCLUSION

The Court of Appeals' decision constitutes an unfortunate and dangerous departure from heretofore undisputed principles of appellate review and Title VII jurisprudence. Unless reviewed by this Court, the opinion will pose a potentially insuperable barrier to members of any minority group seeking to eradicate discriminatory employment-selection procedures. This Court has never countenanced an appellate court's substitution of intuitive, seat-of-the-pants reasoning for careful factfinding -- made by a district court that had educated itself over a period of years and during two lengthy trials -- as a justification of exclusionary employment tests. Now is

not the time for this Court to change its course.

Accordingly, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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